

ORDER

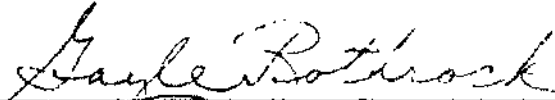
The violations asserted by Notices of Civil Penalty 6026 through 6074 are affirmed. The penalties assessed by Notices 6026 through 6050 are vacated. The penalties assessed by Notices 6051 through 6074 are each vacated as to the amount in excess of \$25. For Notices 6051 through 6074 penalties aggregating \$600 are affirmed.

DONE this 9<sup>th</sup> day of November, 1984.

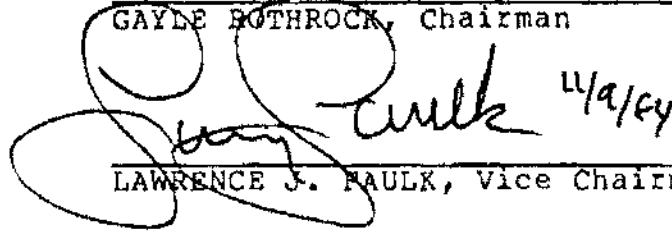
POLLUTION CONTROL HEARINGS BOARD



WICK DUFFORD, Lawyer Member



GAYLE BOTHROCK, Chairman

 11/9/84

LAWRENCE J. FAULK, Vice Chairman

IX

Looking at the entire array of facts and circumstances, the imposition of any penalties at all for the days prior to March 2, 1984, is inappropriate. The violations were simply the result of a good faith misunderstanding as to what was required. However, for the 24 days of violation after March 2, 1984, there is no compelling mitigating explanation for ASARCO's continued violation. That discussions between attorneys were initiated does not obscure the clear message of the letter, received by ASARCO on March 2, 1984, stating PSAPCA's intentions under Resolution 503.

X

Nonetheless, considering the technical character of the violation, the past behavior of the violator and the corrective action instituted, no more than a nominal penalty for the violations after March 2, 1984, should be imposed. Here the statutory maximum was levied. We conclude that one tenth of that amount or \$25 per day would be a reasonable penalty for the 24 days in question.

XI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

1 physical consequences of the violation. Here the penalty is imposed  
2 for 49 days of missed sampling. However, Resolution 503 does not  
3 define the term "continuous." In light of the history of dealings on  
4 this matter between PSAPCA and ASARCO, the meaning of "continuous"  
5 monitoring was ambiguous in the context of the switch from low volume  
6 to high volume arsenic particulate samples. Under the circumstances,  
7 ASARCO adopted a plausible interpretation of the term and pursued the  
8 same in good faith until advised of PSAPCA's views to the contrary on  
9 March 2, 1984.

10 Moreover, the requirement violated has to do only with the  
11 frequency of monitoring for a contaminant not subject to any standard  
12 enforceable by penalty. There is no evidence that unusual or  
13 excessive emissions of arsenic occurred during the time in question.  
14 There is no suggestion that the failure to follow the daily sampling  
15 routine in and of itself resulted in any environmental harm.

#### 16 VII

17 The prior behavior of the violator involves no previous violations  
18 of the "continuous" monitoring requirement first imposed in 1976 and  
19 observed for nearly eight years.

#### 20 VIII

21 Since the events at issue, ASARCO has returned to its prior  
22 practice and no other violations of the "continuous" monitoring  
23 requirement have occurred.

1 civil penalty for the violation of a provision of PSAPCA Board  
2 resolution.

3 II

4 PSAPCA has the statutory authority to issue orders requiring  
5 monitoring of air contaminants. RCW 70.94.141

6 III

7 The interpretation of an administrator who must implement a  
8 regulatory term is entitled to deference. Monitoring for arsenic "on  
9 a continuous basis" as required by the PSAPCA Board's Resolution 503  
10 is interpreted by the agency's control officer as meaning daily  
11 sampling. We conclude that this was the meaning of the PSAPCA Board.

12 IV

13 ASARCO violated Resolution 503 by failing to collect a 24-hour  
14 sample of arsenic containing particulates at three monitoring sites on  
15 the 49 days in question.

16 V

17 The appropriateness of the amount of a penalty is a matter  
18 involving consideration of factors bearing on its reasonableness.  
19 These include:

- 20 a) The nature of the violation;  
21 b) The prior behavior of the violator;  
22 c) Actions taken after the violation became known to solve the  
23 problem.

24 VI

25 The nature of the violation encompasses such matters as the  
26 duration of the offense, the type of requirement violated and the  
27

1 issued a Notice of Violation alleging the violation of Resolution 503  
2 on 49 days between February 1 and March 31, 1984. Of these, 24 days  
3 were after March 2, 1984, the date on which ASARCO received notice  
4 that in PSAPCA's view once every sixth day was not "continuous"  
5 monitoring. On May 31, 1984, PSAPCA sent ASARCO 49 separate Notices  
6 of Civil Penalty, each assessing \$250, one for each of the days in  
7 February and March when arsenic particulate samples were not collected  
8 by ASARCO at three monitoring stations.

9 XVI

10 At the time of the alleged violations there was no applicable  
11 ambient air quality standard for arsenic.

12 XVII

13 Any Conclusion of Law which should be deemed a Finding of Fact is  
14 hereby adopted as such.

15 From these Findings the Board comes to these

16 CONCLUSIONS OF LAW

17 I

18 At the time of the violations asserted in these consolidated  
19 cases, RCW 70.94.431 stated in pertinent part:

20 ...any person who violates any of the provisions of  
21 chapter 70.94 RCW or any of the rules and regulations  
22 of the department or the board shall incur a penalty  
in the form of a fine in an amount not to exceed two  
hundred fifty dollars per day for each violation....

23 At the hearing, ASARCO withdrew that portion of its appeal which  
24 asserted that chapter 70.94 RCW does not authorize imposition of a  
25

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 84-120 thru -168

1 to 6-day and 3-day schedules of PSAPCA hi-vols) as confirmation of the  
2 planned schedule change.

3 XII

4 On February 17, 1984, an engineer from PSAPCA learned in  
5 conversation from a member of the smelter's technical staff that  
6 samples were being collected on a once in six day schedule. This was  
7 reported to PSAPCA's control officer who, on February 29, 1984, wrote  
8 to ASARCO, quoting Resolution 503 and stating:

9 Monitoring for arsenic once every sixth day...is not  
10 'on a continuous basis' and does not conform to Board  
requirements.

11 The letter went on to inform ASARCO that PSAPCA expected an immediate  
12 resumption of "continuous monitoring." This letter was not actually  
13 received by ASARCO until March 2, 1984.

14 XIII

15 After ASARCO was apprised of PSAPCA's position on "continuous"  
16 monitoring it initiated discussions through its attorney with PSAPCA's  
17 attorney to see if agreement could be reached on a monitoring schedule  
18 less frequent than daily. PSAPCA's attorney replied in effect, in the  
19 negative, by a letter dated March 30, 1984. On this same day, by a  
20 letter crossing in the mail, ASARCO advised PSAPCA of its intention to  
21 return to daily sampling with low volume samplers.

22 XIV

23 ASARCO reported to PSAPCA the dates and places of its once in six  
24 day sampling and also its return to daily sampling in its Quarterly  
25 Report dated April 6, 1984. Thereafter, on April 30, 1984, PSAPCA

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW & ORDER  
PCHB Nos. 84-120 thru -168

1 valley non-attainment area, the agency maintains three samplers, so  
2 that each piece of equipment is actually on a once in three day  
3 schdule.

4 X

5 prior to the events at issue, ASARCO made a corporate decision to  
6 undertake a shift from low volume to high volume samplers for  
7 particulate in its facilities nationally. Management at the smelter  
8 was anxious to make this change because environmental groups had  
9 criticized the accuracy of its low volume sampling for arsenic.

10 XI

11 Some time in December of 1983 or in January of 1984, the plant  
12 manager of the smelter called the control officer for PSAPCA and  
13 advised the agency of the plan to shift to the use of high volume  
14 samplers for arsenic particulates. There was no objection. However,  
15 the conversation did not include any discussion of the sampling  
16 interval to be used. Because of both EPA's program and common  
17 practice, ASARCO's manager assumed that the approved shift to high  
18 volume samplers implied approval to shift to a once in six days  
19 sampling schedule. He believed that such a schedule was consistent  
20 with the directive of PSAPCA Resolution 503 to maintain monitoring  
21 stations to determine ambient concentrations of arsenic containing  
22 particulates "on a continuous basis." While PSAPCA never expressly  
23 authorized ASARCO's use of a one daily sample every sixth day routine,  
24 ASARCO's manager read PSAPCA's letter of January 23, 1984, (referring  
25

1 shifted to one twenty-four (24) hour sample every sixth day. The  
2 third unit was replaced with a high-volume monitor (at a new sampling  
3 site) on February 12, 1984, and this monitor commenced operation on  
4 the same sixth day midnight to midnight sampling schedule. The three  
5 high-volume monitors were operated on the six-day schedule through  
6 March 30, 1984. ASARCO re-established daily sampling with three  
7 low-volume monitors on April 1, 1984.

#### 8 VIII

9 Ambient particulate monitoring is not done by continuous  
10 analyzers, but rather by the collection of samples gathered by  
11 monitoring equipment over some time interval. The United States  
12 Environmental Protection Agency (EPA) receives data on ambient air  
13 quality generally from a monitoring network maintained throughout the  
14 nation. Under this EPA program, data on particulates from high-volume  
15 monitors is collected on a one 24-hour sample every six days  
16 schedule. (See 40 CFR 58.13.) PSAPCA maintains 28-30 high-volume  
17 monitors in its geographic area to collect particulate samples. The  
18 majority of these monitors are operated on a once in six day schedule,  
19 although some are operated on a once in three day schedule. ASARCO's  
20 prior experience with the use of high volume monitoring of particulate  
21 from the smelter has involved use of a once in six day schedule.

#### 22 IX

23 High volume samplers for particulate matter are not normally  
24 operated on a daily sampling basis. Where PSAPCA uses high volume  
25 sampling to collect daily particulate information for the Duwamish

26 FINAL FINDINGS OF FACT,  
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PCHB Nos. 84-120 thru -168



1 These terms were continued in force and effect by Resolution 446  
2 adopted June 7, 1979.

3 V

4 On April 10, 1980, PSAPCA's Board approved Resolution 464,  
5 granting a variance for the smelter. Section 1(10) stated:

6 ...ASARCO, Inc. shall continue to operate and bear  
7 all costs of operating and maintaining three  
8 monitoring stations to determine ambient air  
concentrations of arsenic containing particulate on a  
continuous basis...

9 No explicit mention was made in this resolution of the type of  
10 monitors to be used or of the frequency of sampling. The monitoring  
11 language of Resolution 464 was continued in effect by Resolution 491,  
12 adopted March 12, 1981.

13 VI

14 On November 12, 1981, PSAPCA's Board adopted Resolution 503 which  
15 ordered ASARCO to comply with numerous directives relating to the  
16 smelter. Paragraph 18 was substantially identical to language of  
17 Resolution 464, quoted in V above. The conditions of Resolution 503  
18 were, by its terms, to remain in effect "until such time as they are  
19 modified or rescinded by the PSAPCA Board of Directors."

20 VII

21 ASARCO complied with PSAPCA's 1976 directive to install three  
22 low-volume monitors and collect samples daily. This type of equipment  
23 was used and this daily routine was followed until the end of January,  
24 1984. On February 1, 1984, two of the units were replaced with  
25 high-volume monitors and the sampling schedule at these stations was

26 FINAL FINDINGS OF FACT,  
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1 proceedings.

2 Witnesses were sworn and testified. Exhibits were examined. From  
3 the testimony heard and exhibits examined, the Board makes these

4 FINDINGS OF FACT

5 I

6 Appellant ASARCO, Incorporated, is a corporation which operates a  
7 copper smelter (the smelter) at Ruston, near Tacoma, Washington.

8 II

9 Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a  
10 municipal corporation of the State of Washington with responsibility  
11 for enforcing the provisions of the Washington Clean Air Act (Chapter  
12 70.94 RCW) within its geographical area--an area which includes the  
13 site of the smelter.

14 III

15 PSAPCA is governed by a Board of Directors which, among other  
16 actions, adopts resolutions and orders directed to individual air  
17 contaminant sources. PSAPCA is administered by a Control Officer who  
18 enforces the resolutions and orders adopted by the Board of Directors.

19 IV

20 On February 19, 1976, PSAPCA's Board approved Resolution 359  
21 granting a variance to the smelter from certain emission limitations  
22 and requiring ASARCO to install and maintain three monitoring stations  
23 to determine ambient air concentrations of arsenic particulates. The  
24 variance specified:

25 The monitors will be low-volume monitors..., will  
26 operate continuously, and will report on a 24-hour  
27 basis.

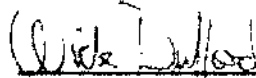


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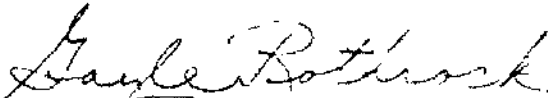
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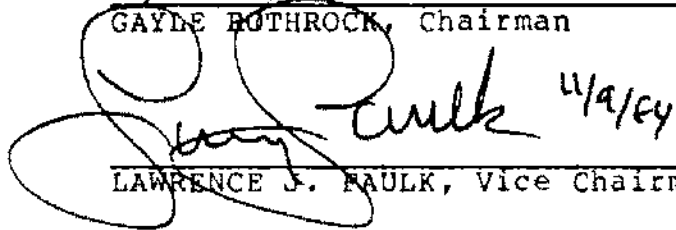
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FINAL FINDINGS OF FACT,  
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Looking at the entire array of facts and circumstances, the imposition of any penalties at all for the days prior to March 2, 1984, is inappropriate. The violations were simply the result of a good faith misunderstanding as to what was required. However, for the 24 days of violation after March 2, 1984, there is no compelling mitigating explanation for ASARCO's continued violation. That discussions between attorneys were initiated does not obscure the clear message of the letter, received by ASARCO on March 2, 1984, stating PSAPCA's intentions under Resolution 503.

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Nonetheless, considering the technical character of the violation, the past behavior of the violator and the corrective action instituted, no more than a nominal penalty for the violations after March 2, 1984, should be imposed. Here the statutory maximum was levied. We conclude that one tenth of that amount or \$25 per day would be a reasonable penalty for the 24 days in question.

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16 CONCLUSIONS OF LAW

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26 FINAL FINDINGS OF FACT,  
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21 ASARCO complied with PSAPCA's 1976 directive to install three  
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23 was used and this daily routine was followed until the end of January,  
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2 | Witnesses were sworn and testified. Exhibits were examined. From  
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4 | FINDINGS OF FACT

5 | I

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7 | copper smelter (the smelter) at Ruston, near Tacoma, Washington.

8 | II

9 | Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a  
10 | municipal corporation of the State of Washington with responsibility  
11 | for enforcing the provisions of the Washington Clean Air Act (Chapter  
12 | 70.94 RCW) within its geographical area--an area which includes the  
13 | site of the smelter.

14 | III

15 | PSAPCA is governed by a Board of Directors which, among other  
16 | actions, adopts resolutions and orders directed to individual air  
17 | contaminant sources. PSAPCA is administered by a Control Officer who  
18 | enforces the resolutions and orders adopted by the Board of Directors.

19 | IV

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21 | granting a variance to the smelter from certain emission limitations  
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23 | to determine ambient air concentrations of arsenic particulates. The  
24 | variance specified:

25 |       The monitors will be low-volume monitors..., will  
26 |       operate continuously, and will report on a 24-hour  
27 |       basis.

1                                   BEFORE THE  
2                                   POLLUTION CONTROL HEARINGS BOARD  
                                  STATE OF WASHINGTON

3   IN THE MATTER OF  
4   ASARCO, INC.,

5                                   Appellant,

6                                   v.

7   PUGET SOUND AIR POLLUTION  
8   CONTROL AGENCY,

9                                   Respondent.

                                  PCHB No. 84-120 thru  
                                  84-168

10       These consolidated matters, the appeal of forty-nine (49) civil  
11       penalties of \$250 each, aggregating \$12,250, for violation of  
12       Resolution No. 503 of the Puget Sound Air Pollution Control Agency,  
13       were heard before Board members Gayle Rothrock, Lawrence J. Faulk and  
14       Wick Dufford at the Board's office in Lacey, Washington, on Wednesday,  
15       October 10, 1984. Mr. Dufford presided.

16       Appellant ASARCO, Inc., was represented by Michael R. Thorp.  
17       Respondent Puget Sound Air Pollution Control Agency was represented by  
18       Keith D. McGoffin. Kim L. Otis, court reporter, recorded the